



6560-50-P

## **ENVIRONMENTAL PROTECTION AGENCY**

### **48 CFR Parts 1536 and 1537**

**[EPA- HQ-OARM-2013-0370; FRL-9946-78-OARM]**

### **Acquisition Regulation: Update to Construction and Architect-Engineer and Key Personnel Requirements**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is issuing a final rule amending the EPA Acquisition Regulation (EPAAR) to remove the evaluation of contracting performance and to incorporate flexibility to identify the required number of days of key personnel commitment during the early stages of contractor performance under the Key Personnel clause. This final rule also provides for minor edits of an administrative nature.

**DATES:** This final rule is effective on **[insert date 30 days after date of publication in the Federal Register]**.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA-HQ-OARM-2013-0370. All documents in the docket are listed on the <http://www.regulations.gov> web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Holly Hubbell, Policy, Training, and

Oversight Division, Acquisition Policy and Training Service Center (3802R), Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460; telephone number: 202-564-1091; email address: [hubbell.holly@epa.gov](mailto:hubbell.holly@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Executive Summary**

This rule incorporates an existing class deviation and makes minor administrative changes to EPAAR parts 1536 and 1537. This rule includes the following content changes: (1) removes 1536.201 Evaluation of contracting performance; (2) provides administrative updates and adds Chief of the Contracting Office (CCO) to 1536.209(c); (3) under 1536.521, updates the term “small purchases” with “simplified acquisition threshold”; (4) under 1537.110(b) the term contracting officer's technical representative(s)” is replaced by Contracting Officer's Representative(s)”; (5) amends 1537.110(c) to incorporate the flexibilities provided by a class deviation to the Key Personnel requirements; and (6) removes “CFR 48” from 1537.110. These changes do not incur any costs, but provide flexibility regarding key personnel commitments.

### **II. General Information**

#### ***A. Does this action apply to me?***

The EPAAR applies to contractors who have a construction, architect-engineer, or service contract with EPA.

#### ***B. What action is the agency taking?***

The rule removes the evaluation of contracting performance and incorporate flexibility to identify the required number of days of key personnel commitment during the early stages of contractor performance under the Key Personnel clause. The rule also provides for minor edits of an administrative nature.

### **III. Background**

EPA published a proposed rule in the Federal Register at 79 FR 47044, August 12, 2014, to remove section 1536.201 on the evaluation of contractor performance under construction contracts and the incorporation of flexibilities provided by a class deviation to the Key Personnel requirements under EPAAR Part 1537. A previous review of the EPAAR, determined that the EPAAR requirement for the evaluation of construction contracts should be removed as it was superseded by FAR 42.1502. Additionally, under EPAAR 1552.237-72, EPA provides contracting officers with the flexibility to identify the required number of days of key personnel commitment during the early stages of contractor performance. The length of time will be based on the requirements of individual acquisitions when continued assignment is essential to the successful implementation of the program's mission. Contracting officers may include a different number of days in excess of the ninety (90) days included in the clause, if approved at one level above the contracting officer. The rule also provides minor administrative edits in the EPAAR sections identified. No comments were received on the previously published proposed rule.

### **IV. Statutory and Executive Orders Reviews**

#### **A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review**

This action is not a “significant regulatory action” under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and therefore, not subject to review under the EO.

#### **B. Paperwork Reduction Act**

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* No information is collected under this action.

#### **C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory**

**Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.**

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute; unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impact of this rule on small entities, “small entity” is defined as: (1) a small business that meets the definition of a small business found in the Small Business Act and codified at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. After considering the economic impacts of this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This action revises a current EPAAR provision and does not impose requirements involving capital investment, implementing procedures, or record keeping. This rule will not have a significant economic impact on small entities.

**D. Unfunded Mandates Reform Act**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, Local, and Tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of the Title II of the UMRA) for State, Local, and Tribal governments or the private sector. The rule imposes no enforceable duty on any State, Local or Tribal governments or the private sector. Thus, the rule is not subject to the requirements of sections

202 and 205 of the UMRA.

#### **E. Executive Order 13132: Federalism**

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure “meaningful and timely input by State and Local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” This rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government as specified in Executive Order 13132.

#### **F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments**

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” This rule does not have tribal implications as specified in Executive Order 13175.

#### **G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks**

Executive Order 13045, entitled “Protection of Children from Environmental Health and Safety

Risks” (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be economically significant as defined under Executive Order 12886, and (2) concerns an environmental health or safety risk that may have a proportionate effect on children. This rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because it does not involve decisions on environmental health or safety risks.

#### **H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use**

This final rule is not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use” (66 FR 28335, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

#### **I. National Technology Transfer and Advancement Act of 1995 (NTTAA)**

Section 12(d) (15 U.S.C. 272 note) of NTTA, Public Law 104-113, directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This final rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

#### **J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations**

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on

environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA has determined that this final rulemaking will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This rulemaking does not involve human health or environmental effects.

#### **K. Congressional Review**

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804 exempts from section 801 the following types of rules (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding this action under section 801 because this is a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

#### **List of Subjects in 48 CFR Parts 1536 and 1537**

Environmental protection, Government procurement.

Dated: June 2, 2016.

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Denise Polk,

Acting Director, Office of Acquisition Management.



Therefore, 48 CFR Chapter 15 is amended as set forth below:

## **PART 1536—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS**

1. The authority citation for part 1536 is revised to read as follows:

**Authority:** 5 U.S.C. 301 and 41 U.S.C. 1707.

### **1536.201 [Removed]**

2. Remove section 1536.201.

### **1536.209 [Amended]**

3. Amend section 1536.209, paragraph (c), by removing the text “CCO” and “RAD” and adding the words “Chief of the Contracting Office”, in their places.

### **1536.521 [Amended]**

4. Amend section 1536.521 by removing the words “small purchase” and adding the words “simplified acquisition threshold”, two times.

## **PART 1537 – SERVICE CONTRACTING**

5. The authority citation for part 1537 is revised to read as follows:

**Authority:** 5 U.S.C. 301 and 41 U.S.C. 1707.

6. Amend section 1537.110 by revising paragraphs (b), (c), and (f) to read as follows:

### **1537.110 Solicitation provisions and contract clauses.**

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(b) The Contracting Officer shall insert a clause substantially the same as the clause at 1552.237-71, Technical Direction, in solicitations and contracts where the Contracting Officer intends to delegate authority to issue technical direction to the Contracting Officer's Representative(s).

(c) The Contracting Officer shall insert the clause at 1552.237-72, Key Personnel, in solicitations and contracts when it is necessary for contract performance to identify Contractor

key personnel. Contracting Officers have the flexibility to identify the required number of days of key personnel commitment during the early stages of contractor performance. The length of time will be based on the requirements of individual acquisitions when continued assignment is essential to the successful implementation of the program's mission. Therefore, Contracting Officers may use a clause substantially the same as in 48 CFR 1552.237-72, regarding substitution of key personnel. Contracting Officers may include a different number of days in excess of the ninety (90) days included in this clause, if approved at one level above the Contracting Officer.

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(f) To ensure that Agency contracts are administered so as to avoid creating an improper employer-employee relationship, contracting officers shall insert the contract clause at 1552.237-76, "Government-Contractor Relations", in all solicitations and contracts for non-personal services that exceed the simplified acquisition threshold.

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